SPECIAL CIVIL APPLICATION NO. 714 OF 1987

Date of decision:10-04-1996

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: S.K. KESHOTE,J
(10-04-1996)

Mr. I. S. Supehia for the petitioner
Ms. Sejal Mandavia for the respondents.

C.A.V. JUDGMENT :

In the present petition challenge is made by the petitioner to the order dated 20-9-1985 of the respondents by which he was discharged from service on the ground that

his services were no more required. The petitioner was appointed as unarmed police constable on probation by order of the respondents dated 3-8-1984. After appointment, the petitioner was sent for training at Baroda Police Training Centre.

2. The respondents filed reply to the writ petition to which the petitioner filed rejoinder. Mr. I. S. Supehia, learned counsel for the petitioner contended that the appointment of the petitioner was on probation for two years and as such before completion of the period of two years his services could not have been terminated. In support of this contention, learned counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of Express Newspapers Ltd. vs. Labour Court, reported in 1964 SC 806. It has next been contended that the basic or foundation of termination of services of the petitioner is misconduct as stated in para 6 of the writ petition, and as such without holding inquiry on the alleged misconduct his services could not have been terminated simpliciter. In the alternative it is contended that it is a case of temporary appointment, but juniors to the petitioner were retained in service while the petitioner, who is senior, has been terminated which is illegal. Not only this, but the provisions of Rule 33 of the Bombay Civil Services Rules have also not been complied with before terminating the services of the petitioner. In support of these two contentions, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of Raj Kumar vs. Union of India, reported in AIR 1975 SC 536, and unreported decision of this Court in (1) Special civil application No.2136 of 1982 decided on 4-9-1986; (2) Special civil application No.5355 of 1984 decided on July 1, 1985; (3)Special civil application No. 2213 of 1981 with special civil application No.3358 of 1981 decided on 5-2-1982; (4) special civil application No.4566 of 1986 with special civil application No.4794 of 1986 decided on 13th August, 1991; and 6278 of 1986 decided on August 9, 1994.

3. On the other hand Miss Sejal Mandavia, learned counsel appearing for the respondents contended that appointment of the petitioner was made on probation and as he was not found suitable for the service he was discharged simpliciter from service, and it is not the case of any misconduct. When overall assessment of the service of the petitioner was made, the authorities were satisfied that he was not suitable for employment and as such he was discharged from service. She further contended that as the appointment of the petitioner was not temporary appointment, and as such the principle of last come first go does not apply in the present case. Similarly, when appointment of

the petitioner was not temporary, the provisions of Rule 33 of the Bombay Civil Services Rules were not to be applied. In support of her contention, learned counsel for the respondents has placed reliance on the decision in the case of Prashant Manvantrai Shah vs. State of Gujarat, reported in 1991(1) GLR 780.

4. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. The first question which arises for consideration of this Court is regarding the nature of appointment of the petitioner, that is, whether it was an appointment on probation or a temporary appointment.

5. Learned counsel for the petitioner has contended that it was a case of appointment on probation as well as an appointment on temporary basis. He further submitted that whether the appointment is considered as on probation or temporary basis, the same is the impact on the basis of the grounds which have been raised in the petition. The appointment order of the petitioner on the post of constable has been produced at annexure-A to the petition. It is true that in the appointment order the words 'probation' and 'temporary' both have been mentioned. But the substance of the order and not the form is to be considered. It is not in dispute that appointment of the petitioner as constable has been made after open selection. It was a regular appointment.

6. Rule 70 of the Gujarat Police Manual provides for the procedure to be followed for making appointment on the posts of police constable and head constable by direct recruitment. Sub-rule (b) of Rule 70 provides that appointment will be made on probation for two years in the case of candidates appointed as constable (armed and unarmed). Appointment of the petitioner was made on probation with further condition that his services were liable to be terminated without any notice. Rule 70 gives the power for making appointment to the post of police constable (armed and unarmed). Looking to the nature of appointment of the petitioner, the word "temporary" which is mentioned therein is superficial, and appointment of the petitioner was only on probation. In case the contention of the learned counsel for the petitioner is accepted and the appointment is taken to be temporary, then it will violate the provisions of Rule 70 of the Manual, and the word "probation" will become redundant. All the appointments which are made after selection are normally made on probation, but the counsel for the petitioner has been unable to satisfy this Court about use of the word 'temporary'. It is difficult to accept that the appointment

which is made after selection can be composite in nature, i.e. on probation and temporary which contradict each other.

7. The respondents have come up with the case in the reply that the appointment of the petitioner was on probation, and termination of his services has been made under Rule 90 of the Gujarat Police Manual. In the rejoinder,the petitioner has not disputed that his appointment was on probation. But the petitioner stated in the rejoinder that his appointment was on probation in a temporary capacity. In the writ petition also the petitioner stated that his appointment was on probation in a temporary capacity, though at some places in the writ petition the petitioner stated that he was appointed in a temporary capacity on probation. The petitioner has tried to keep both head and tail, obviously to suit him. In case his appointment was on temporary basis, then there was no question of any probation. The power under Rule 70 of the Police Manual is for making appointment on probation. Appointment of the petitioner was made after following the procedure of selection and as such by no stretch of imagination it can be said that it is a temporary appointment. Taking into consideration the pleadings of the parties, the order of appointment and the provisions of Rule 70 of the Gujarat Police Manual, it is held that the appointment of the petitioner was on probation.

8. As the appointment of the petitioner was on probation, the contention raised by the learned counsel for the petitioner with reference to the provisions of Bombay Police Manual and the Bombay Civil Services Rules relating to termination of services of temporary employee need not be considered and discussed. All the unreported decisions of this Court cited by the learned counsel for the petitioner relate to termination of services of temporary employee and as such none of the authorities cited by him is of any help to the petitioner as the petitioner was not appointed on temporary basis.

9. Rule 90 of the Bombay Police Manual deals with confirmation and discharge of a..R

appointed on probation. Relevant provisions of Rule 90 of the Manual reads as under:

> "90. Appointment on Probation.-- (1) (a) A candidate for a higher service or post who is not in permanent Government service may be appointed to the higher service or post on

probation subject to rules regarding loss of appointment on failure to pass the departmental examination within a prescribed period or for other causes.

(b) appointment of persons in permanent Government service to post for which they may have been selected as direct recruits, should be made on probation only if a probationary period is prescribed in respect of these posts.

(2) Whenever any person is appointed on

of probation or of confirming, reverting or discharging him should be decided as far as possible before the expiry of the period of probation.

..... "

Clause (b) of sub-rule (1) of Rule 90 of the Manual provides that the appointment made after selection should be made on probation only if probationary period is prescribed in respect these posts. As stated earlier, Rule 70 of the Manual provides that the appointments will be made on probation for two years in case of candidates appointed as constables (armed and unarmed). Sub rule (2) of Rule 90 of the Manual provides that extension of period of probation or confirmation or discharge should be decided as far as possible before the expiry of the period of probation. Discharge of probationer is regulated by sub rule (2) of rule 90. Assessment of the work of probationer should be made for the purposes of confirmation and discharge before expiry of the period of probation. The contention of the learned counsel for the petitioner that termination of service could have been made only at the expiry of the period of probation is not acceptable because it goes contrary to the provisions contained in sub rule (2) of Rule 90 of the Manual. When rules are framed regulating the period of probation, extension thereof, confirmation or discharge, then the authority has to act in accordance with those rules. Sub-rule (2) of Rule 90 is very clear. As per this provision discharge or termination of a probationer should be made before expiry of the period of probation. In the present case the order of termination of the petitioner was made before expiry of the period of probation. Termination of the services of the petitioner is made on the ground that his services were no more required. It is one of the terms of the appointment of the petitioner that his services can be terminated without any notice. This being the condition of employment, no reason was required to be

assigned to the petitioner, nor any notice was required to be given before discharging him from service.

10. It is true that the court has to consider the substance and not the form of the order. It is equally true that in case a proper case is made out, the court can lift the veil and see that whether it is a case where in the garb of termination simpliciter the services of a probationer has been terminated by way of penalty. The petitioner was appointed on 3-8-1984 and his services were terminated on 20th September, 1985, i.e. after more than one year. In reply to the writ petition the respondents have come up with the case that the petitioner's behaviour over the period of one year has been considered and the petitioner having been found unsuitable he has been discharged from service. It has further been stated that the impugned order of termination has no connection with any other particular incident. It has further been stated that it is the cumulative of several incidences that has led to the impugned order.

11. In para 6 of the writ petition, the petitioner stated that his services were terminated on account of misconduct. What was the misconduct has also been stated by the petitioner in the same paragraph. According to him, while he was undergoing training at Baroda Police Training Centre one Mr. Bhadoria, Head Constable, was the instructor. One day the petitioner was not well dressed while going to the parade. He, therefore, went out of the parade to dress himself properly. At that time Mr. Bhadoria asked him to leave the parade ground. While the petitioner was leaving the parade ground Mr. Bhadoria slapped him and started abusing him. When the petitioner asked him as to why he was beating and abusing him, Mr. Bhadoria asked, 'why did the petitioner speak before him?'. At that time another slap was given to the petitioner by Mr. Bhadoria. Thus the petitioner was humiliated and driven out of the parade ground. Mr.. Bhadoria also made report against the petitioner to the Police Inspector. It seems that the statements of other persons and also that of the petitioner were recorded in connection with the aforesaid incident, and a report was sent to the District Superintendent of Police, Rajkot. It also appears that the Police Inspector Mr. A.M. Khan also reported that the petitioner had remained absent, though the petitioner had proceeded on leave for appearing at the Second Year B.A. examination, which leave was duly granted in advance. Acting on these so-called reports the impugned order was passed without affording any opportunity of hearing to the petitioner.

12. In the reply affidavit of Mr. R. N. Bhattacharya, Deputy Inspector General of Police, Saurashtra, North Range, Rajkot, it is stated that several incidences took place during the training period of the petitioner, which led to the conclusion that the petitioner was indisciplined in training and was unsuitable for police service. It has further been stated that as and when any complaint was received against the petitioner, such complaint was investigated by the officers of the Police Training School, Baroda, after recording the statements of various persons including other trainees and officers of the school. Even the petitioner was afforded an opportunity of hearing with regard to the complaint received against him. From the aforesaid statements of the Deputy Inspector General of Police it cannot be said that termination of the services of the petitioner is the result of the incidents stated by the petitioner in para 6 of the petitioner. On overall assessment of the work of the petitioner, when he was found unsuitable to be continued in service, the petitioner's services were terminated. As it is provided in Rule 3 of the Bombay Police (Punishment and Appeals) Rules, 1966, discharge of probationer, whether during or at the end of the period of probation on account of unsuitability for service, does not amount to punishment. It is a case of discharge of a probationer during the period of probationer. Discharge of a probationer from service can be made during the period or at the end of the period of probation. Therefore the contention of the learned counsel for the petitioner that discharge can be made only at the end of probation is not tenable.

13. Having gone through the contents of the writ petition I do not find any substance in the contention of the learned counsel for the petitioner that termination of services of the petitioner was by way of penalty. From the writ petition, the reply affidavit and the rejoineder it comes out that the petitioner has been given opportunity to explain against the complaint which was made against him. Preliminary inquiry conducted on the complaint was taken into consideration and the overall performance of the petitioner was also considered before the petitioner's services were terminated. According to the petitioner, it is a case of termination by way of penalty on the ground of conduct on some inquiry. But at the most it can be said to be a fact finding inquiry. In the case of Governing Council of Kidwai Memorial Institute of Oncology, Bangalore vs. Dr. Pandurang Godwalkar,, AIR 1993 SC 392, the Apex Court held that whenever services of an employee is terminated during the period of probation or while his appointment is on temporary basis, by order of termination simpliciter after

some preliminary inquiry it cannot be held that some inquiry had been made against him before issuance of order of termination, it really amounted to his removal from service on a charge, as such penal in nature. It has further been held in the aforesaid case by the Apex Court that the principle of tearing of veil for finding out real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge so levelled and action taken. If decision is taken, to terminate the service of an employee during period of probation, after taking into consideration overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment. It has further been held that the appointing authority at stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of such employee while discharging his duties for the purpose of making assessment of the performance of such employee. In the present case, as stated earlier, overall assessment of the work of the petitioner was made and the report or complaint made against him was also taken into consideration. But I do not find any direct nexus between the incident which has been stated by the petitioner in para 6 of the petition and the order of discharge from service.

14. In the case of M. Venogopal vs. Divisional Manager, LIC,JT 1994(1) SC 281, the Apex Court held that when termination of services of a probationer on the ground of unsuitability for service is made, no notice of personal hearing is required to be given to the employee.

15. It has last been contended by the learned counsel for the petitioner that the petitioner was not given an opportunity of improving his work during the period of probation. This contention is devoid of any substance. It is a case where the petitioner was given sufficient opportunity to improve himself which is apparent from the fact that his services were terminated after more than one year from the date of appointment.

16. In the result this writ petition fails and the same is dismissed. Rule discharged. No order as to costs.